

confiscation of firearms from law-abiding peaceable citizens in the aftermath of Hurricane Katrina was constitutional.

Preventing an individual from exercising what the *Heller* court said was the Second Amendment's core lawful purpose of self-defense is no less dangerous when accomplished by a state law than by a Federal law.

The Second Amendment survives today by a single vote in the Supreme Court. Both its application to the states and whether there will be a meaningfully strict standard of review remain to be decided.

Judge Sotomayor has already revealed her views and they are contrary to the text, history and meaning of the Second and Fourteenth Amendments. As a Circuit Court judge, she is constrained by precedent. But as a Supreme Court Justice appointed for life, she would be making precedent.

A super majority of Americans believe in an individual personal right to arms. They deserve a Justice who will interpret the Second Amendment in a fair and impartial manner and write well crafted opinions worthy of respect from those of us who must live by their decisions.

The President who nominated Judge Sotomayor has expressed support for the city of Chicago's gun ban which is being challenged in *NRA v. Chicago*, a case headed to the Supreme Court.

Seating a Justice on the Supreme Court who does not treat the Second Amendment as a fundamental right deserving of protection against cities and states could do far more damage to the right to keep and bear arms than any legislation passed by Congress. Thank you.

Senator KLOBUCHAR. Thank you very much for your testimony, Ms. Froman.

Our next witness is David Kopel. He is currently the Research Director of the Independence Institute in Golden, Colorado and an Associate Policy Analyst at the CATO Institute.

He is also a contributor to the National Review Magazine. He graduated from the University of Michigan Law School. Thank you very much for being here. We look forward to your testimony.

STATEMENT OF DAVID KOPEL, ESQ., INDEPENDENCE INSTITUTE

Mr. KOPEL. The case of *Sonia Sotomayor v. the Second Amendment* is not yet found in the record of Supreme Court decisions. Yet if Judge Sotomayor is confirmed to the Supreme Court, the opinions of the newest Justice may soon begin to tell the story of a Justice with disregard for the exercise of constitutional rights by tens of millions of Americans.

New York state is the only state in the union which completely prohibits the peaceful possession of nunchaku, a xenophobic ban enacted after the opening to China in the early 1970s after the growth of interest in martial arts.

In a colloquy with Senator Hatch on July 14, Judge Sotomayor said that there was a rational basis for the ban because nunchaku could injure or kill someone. The same point could just as accurately be made about bows and arrows, swords or guns. All of them

are weapons and all of them can be used for sporting purposes or for legitimate self-defense.

Judge Sotomayor's approach would allow states to ban archery equipment with no more basis than declaring the obvious, that bows are weapons. Even if there were no issue of fundamental rights in this case, Judge Sotomayor's application of the rational basis test was shallow and insufficiently reasoned and it was contrary to Supreme Court precedent showing that the rational basis test is supposed to involve a genuine inquiry, not a mere repetition of a few statements made by prejudice people who impose the law.

The plaintiff in *Maloney* had argued that even putting aside the Second Amendment, the New York prohibition violated his rights under the Fourteenth Amendment. There was no controlling precedent on whether Mr. Maloney's activity involved an unenumerated right protected by the Fourteenth Amendment.

Accordingly, Judge Sotomayor and her fellow *Maloney* panelists should have provided a reasoned decision on the issue. Yet Judge Sotomayor simply presumed with no legal reasoning that Mr. Maloney's use of arms in his own home was not part of the exercise of a fundamental right.

Testifying before this committee on July 14, Judge Sotomayor provided further examples of her troubling attitude to the right to arms. She told Senator Hatch that the *Heller* decision had authorized gun control laws which could pass the rational basis test.

To the contrary, the *Heller* decision had explicitly rejected the weak standard of review which Justice had argued for in his dissent.

Both Judge Sotomayor and some of her advocates have pointed to the Seventh Circuit's decision in *NRA v. Chicago* as retrospectively validating her actions in *Maloney*. The argument is unpersuasive. Both the *Maloney* and the *NRA* courts cited 19th century precedents which had said that the Fourteenth Amendment's "privileges or immunities" clause did not make the Second Amendment enforceable against the States.

However, as the *Heller* decision itself had pointed out, those cases "did not engage in the sort of 14th Amendment inquiry required by our later cases."

In particular, the later cases require an analysis under a separate provision of the 14th Amendment, the Due Process clause. Notably, the Seventh Circuit addressed this very issue and provided a detailed argument for why the existence of modern incorporation under the Due Process clause would not change the result in the case at bar. In contrast, Judge Sotomayor's per curiam opinion in *Maloney* did not even acknowledge the existence of the issue.

Various advocates have made the argument that since *Maloney* and *NRA* reached the same result, and since two of the judges in *NRA v. Chicago* were Republican appointees who were often called "conservatives," then the *Maloney* opinion must be all right. This argument is valid only if one presumes that conservatives and/or Republican appointees always meet the standard of strong protectiveness for constitutional rights which should be required for any Supreme Court nominee.

In the case of the *NRA v. Chicago* judges, that standard was plainly not met. The Seventh Circuit judges actually made the pol-

icy argument that the Second Amendment should not be incorporated because incorporation would prevent states from outlawing self-defense by people who are attacked in their own homes.

A wise judge demonstrates and builds respect for the rule of law by writing opinions which carefully examine the relevant legal issues, and which provide careful written explanations for the judge's decisions on those issues. Judge Sotomayor's record on arms rights cases has been the opposite. Her glib and dismissive attitude toward the right is manifest in her decisions and has been further demonstrated by her testimony before this Committee. In Sonia Sotomayor's America, the peaceful citizens who possess firearms, bows, or martial arts instruments have no rights which a State is bound to respect, and those citizens are not even worthy of a serious explanation as to why.

Thank you.

[The prepared statement of Mr. Kopel appear as a submission for the record.]

Senator KLOBUCHAR. Thank you very much. And did I say your name correctly? Oh, well, that was good. Thank you.

Next we have Ilya Somin, and Professor Somin is an assistant professor at George Mason University School of Law. His research focuses on constitutional law, property law, and the study of popular political participation and its implications for constitutional democracy. He currently serves as co-editor of the Supreme Court Economic Review, one of the country's top-rated law and economic journals. After receiving his M.A. in Political Science from Harvard University and his law degree from Yale Law School, Professor Somin clerked for Judge Jerry E. Smith of the U.S. Court of Appeals for the Fifth Circuit.

I look forward to your testimony, Mr. Somin. Thank you for being here.

**STATEMENT OF ILYA SOMIN, PROFESSOR, GEORGE MASON
UNIVERSITY SCHOOL OF LAW**

Mr. SOMIN. Thank you very much. I would like to thank the Committee for the opportunity to testify and, even more importantly, for your interest in the issue of constitutional property rights that I will be speaking about. For the Founding Fathers, the protection of private property was one of the most important reasons for the establishment of the Constitution in the first place.

As President Barack Obama has written, "Our Constitution places the ownership of private property at the very heart of our system of liberty."

Unfortunately, the Supreme Court and other Federal courts have often given private property rights short shrift and have denied them the sort of protection that is routinely extended to other constitutional rights. I hope the Committee's interest in this issue will over time help begin to change that.

In my oral testimony today, I will consider Judge Sotomayor's best property rights decision, *Didden v. Village of Port Chester*. In my written testimony, which I hope will be entered into the record, I also discuss her decision in *Krimstock v. Kelly*.

The important background to the *Didden* decision is the Supreme Court's 2005 decision in the case of *Kelo v. city of New London*,